HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

A.O. 216 of 2004

Smt. Dhan Kumari & others vs. M.A.C.T. Dehradun & others

Approved for reporting

_____

Not approved for reporting

Date of decision 08.09.2006

Initial of Judges

HIGH COURT OF UTTARANCHAL AT NAINITAL

Appeal from Order No. 216 of 2004

1. Smt. Dhan Kumari w/o Late Shri Bheem Bahadur
2. Master Resham Kumar Thapa s/o Late Sri Bheem Bahadur
3. Master Ravindra Kumar Thapa s/o Late Sri Bheem Bahadur
4. Chintu Thapa s/o Late Shri Gambhir thapa
5. Smt. Ragma w/o Shri Chintoo Thapa,
   Petitioners no. 2 and 3 are minors through mother Smt. Dhyan Kumari. All residents of village Anarwala,Guchchupani, Cantonment, Dehradun

..... Appellants

versus

1. Motor Accident Claims Tribunal, Dehradun
2. Anand Singh (Driver) s/o Late Shri Bhagat Singh R/o Haripur, Herbertpur, P.S. Vikas Nagar, District Dehradun
3. Smt. Anju Gupta (Owner) w/o Sri Shiv Kumar, Resident of 24, Chakrata Road, Dehradun.
4. The New India Assurance Co. Ltd. through Divisional Manager, Vikas Nagar, Dehradun

..... Respondents

Sri R.P. Nautiyal, Advocate for the petitioners
Sri Rajesh Joshi & Sri Afzal Ahmad, Advocate for respondent no.2 & 3, Sri V.K. Kohli, Sr. Advocate assisted by Sri I.P. Kohli, Advocate for respondent no. 4.

Dated: September 8, 2006

Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble Rajesh Tandon, J.

Hon. Rajesh Tandon, J.

1. This is claimants' appeal against the Award dated 6.4.2004 passed by the Motor Accident Claims Tribunal, Dehradun, in Motor Accident Claim Case No. 240 of 2002.

2. The claimants who are wife, children, father and mother of deceased Bheem Bahadur claimed compensation of Rs.11,10,000/- on account of his death in a motor vehicle accident on 12.8.2002, when his scooter bearing registration No. D.N.F. 6893 was dashed by the offending vehicle Bus bearing registration No. UP o7-A -88o7, which was being driven by Sri Anand Singh, respondent no. 2. Sri Bheem Bahadur sustained grievous injuries in the accident and he succumbed to those injuries instantaneously. The pillion rider Kumbh Singh Rana also sustained injuries in the accident. The deceased was posted as Rifleman in 32 Rashtriya Rifles of Indian Army and he was 22 years of age at the time of accident. According to the claimants he was getting Rs.6,522/- as monthly salary at the time of accident.

3. The respondents contested the claim and filed their respective written statements. Respondents no. 2 Anand Singh, Driver of the Bus and respondent no. 3 Smt. Anju Gupta, owner of the Bus filed joint written statement and denied that the accident had taken place due to rash and negligent driving by the driver of the Bus. They submitted in their written statement that the scooter rider was himself negligent.

4. The insurer of the Bus filed separate written statement and pleaded that the accident had taken place due to rash and negligent driving by the scooter driver himself. Additional pleas were also taken on behalf of the insurance company stating therein that there was apparent collusion between the insured and the claimants and the insurance policy is subject to compliance of 64VB of the Insurance Act.

5. To prove their case, the claimants examined PW 1 Smt. Dhan Kumar widow of deceased Bheem Bahadur and P.W.2 Sri

Kumbh Singh Rana in support of their case. The claimants also filed documentary evidence i.e. copy of the F.I.R. copy of post mortem report of the deceased and last pay certificate of the deceased, whereas the driver, owner and insurer of the offending vehicle did not adduce any oral evidence. They also filed copy of the driving licence, copy of registration certificate of the bus as well as copy of insurance policy.

6. The Tribunal after considering the evidence on record held that the accident took place due to contributory negligence by the drivers of both the vehicles and ratio of rash and negligence on the part of both the vehicles involved in the accident was 60% (bus) and 40% (scooter). Hence, the Tribunal has held that the claimants are entitled to get only 60% amount of the total compensation.

7. On the basis of the last pay certificate of the deceased the Tribunal has calculated the amount of compensation. The Tribunal deducted leave ration allowance of Rs. 178.00, personal maintenance hygiene allowance of Rs.30.00 and Special compensatory counter insurgency allowance of Rs.1,500.00 from the gross salary of Rs.6522.00 and assessed the net amount of salary to Rs.4, 800.00 per month. However, for determination of compensation his monthly income was assessed as Rs.5,000.00 per month. A deduction of Rs.1,500/- for his own expenses was also made and thus the annual dependency of the claimant on the income of the deceased was calculated as 3500x12=Rs. 42,000/- per annum. Considering the age of the deceased the Tribunal applied multiplier of 17 and thus assessed the amount of compensation as 42,000 x 17 = 7,24,000.00. The Tribunal also deducted 40% sum on account

of contributory negligence and thus awarded Rs.4,34,000/- as compensation along with interest @ 9% per annum.

8. Sri R.P. Nautiyal, the learned counsel for the appellants has submitted that the Motor Accident Claims Tribunal was not justified in holding that the accident took place due to contributory negligence of the deceased and the bus driver while there is sufficient evidence on record to prove that the accident took place due to rash and negligent driving by the driver of the bus alone. Further a sum of Rs.1,500/- was wrongly deducted by the Tribunal from the monthly amount of salary which was payable to the deceased as counter insurgency allowance.

9. The Claimants have alleged that the accident took place due to rash and negligent driving by the Bus driver. To prove the factum of the accident as well as rash and negligence on the part of the Bus Driver, the Claimants examined P.W.2 Kumbh Singh Rana, who was pillion rider on the scooter at the time of accident. This witness has stated that he along with deceased Bheem Bahadur Thapa were going to their houses at Dehradun on Scooter No. DNF-6893 from Vikasnagar and at about 7.45 P.M. when they reached near Soil Conservation Office, then the Bus No. U.P. 07A- 88o7 which was coming from the opposite direction in a rash and negligent manner hit the scoter, due to which they fell down on the road and Bheem Bahadur succumbed to the injuries at the spot.

10. Respondents have denied in their written statements that the accident took placed due to rash and negligent driving by the Bus driver, however they did not adduce any evidence in support of their pleadings. It was a head on collision and the driver of the Bus had sufficient opportunity to observe the

scooter coming from the opposite direction. If the driver of the Bus was vigilant he would have certainly avoided the accident. This witness was cross-examined on behalf of the respondents but nothing has come out from his cross-examination to disbelieve his statement. Thus the claimants have succeeded to prove that the accident took place due to rash and negligent driving by the Bus driver.

11. The Apex Court in the case Syad Akbar vs. State of Karnataka, AIR 1979 SC 1848 has held that if no reasonable explanation as to the cause of accident is coming forth from the side of the defendants, the maxim res ipsa liquitur may apply. The relevant observation of the Apex Court is reproduced below:

"It is to such cases that the maxim res ipsa liquitur may apply, if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. To emphasis the point, it may be reiterated that in such cases, the event or accident must be of a kind which does not happen in the ordinary course of things if those who have the management and control use due care. But , according to some decisions, satisfaction of this condition alone is not sufficient for rep ipsa to come into play and it has to be further satisfied that the event which caused the accident was within the defendant's control. The reason for the second requirement is that where the defendant has control of the thing, which caused the injury, he is in a better position than the plaintiff to explain how the accident occurred. * * * * *

Thus for the application of the maxim res ipsa loquitur no less important a requirement is that the res must not only bespeak negligence, but pin it on the defendant."

12. The driver of the Bus was the best witness to state about the cause of the accident but he could not gain courage to appear in the witness box and to state about the cause of accident. Thus in the absence of any evidence on behalf of the respondents regarding cause of accident, on the basis of dictum of res ipsa locuqitor it is quite clear that the accident had taken place due to rash and negligent driving by the Bus driver.

13. The Tribunal has held contributory negligence of the deceased on the basis of the statement of P.W.2 Kumbh Singh Rana that at the time of accident the Bus was visible even at the distance of 100 metres and there was no other vehicle on the road except the offending Bus and the Scooter. We are of the opinion that the Claims Tribunal was not justified in holding contributory negligence on the part of the deceased. P.W.2 Kumbh Singh Rana has categorically stated that the Bus dashed the scooter after coming on wrong side.

Tkc ge lsykdqbZ ls vkxs soil conservation igqWps rks lkeus ls ,d cl ua ;w0ih0 & , ŠŠŒ„ rsth o ykijokgh ls vk;h vkSj gekjh lkbM ij vkdj ges VDdj Ekkj nhA

14. If the Bus dashed the scooter after coming on the wrong side, there was no scope for the learned Tribunal to hold that the scooter rider had also contributed in the accident.

15. Counsel for the respondent no. 4 Insurance Company has also referred to the case of Halkibai and another vs. Managing Director, Rajasthan State Road Transport corporation and another 2004 (3) T.A.C. 821 (M.P.). In that case a pedestraian while crossing the highway was dashed by the bus and died. The

Court has held that deceased had not taken sufficient precaution before crossing road and he was also negligent. Counsel for the respondent no. 4 also cited the case of T.R. Parukutty and others vs. Kerala State Road Transport Corp. and others , 2005 (2) T.A.C. 810 (Ker.), where a head-on collision between autorickshaw and Corporation Bus had taken place. The court has held that there cannot be an arithmetic fixation of negligence and liability to pay compensation rests with both the parties in equal proportion. Counsel for the Insurance Company has further cited the case of Stat eof H.P. and another vs. Smt. Satya Devi and others, 2005 (2) T.A.C. 822 (H.P.). In that case a head-on collision took place between maruti car and bus resulting in death of owner of the car. In that case drivers of both the vehicle were held responsible equally.

16. The facts of the cases cited by the counsel for the respondent no. 4 are different from the present case. In the present case the bus driver dashed the scooter after coming on wrong side while there was no other traffic on the road. There is uncontroversial evidence of P.W.2 Kumbh Singh Rana on the record, which unerringly pointed out the rash and negligent driving by the bus driver.

17. Thus on the strength of evidence on record we hold that the accident had taken place due to rash and negligent driving by the Bus driver alone and there was no contributory negligence of the deceased.

18. To prove the income of the deceased the claimants have filed last pay certificate issued by the Adjutant of 32 Rashtriya Rifles Bn. Which shows the following amount included in the monthly salary of the deceased:

(a) Basic pay Rs.3320.00

(b)	Dearness Allowance	Rs.1494.00
©	Leave Ration All.	Rs. 178.00
(d)	Personal maintenance Hygiene Allowance	Rs. 30.00
(e)	Special Compensatory Counter Insurgency Allowance	Rs.1500.00
	Total:	Rs.6,522.00

19. The Tribunal has deducted the amount of item (c) leave ration allowance Rs.178.00, (d) personal maintenance hygiene allowance Rs.30.00 and (e) special compensatory counter insurgency allowance Rs.1,500.00. In our opinion the Tribunal was not justified in deducting the amount of Rs.1,500.oo of Special compensatory counter insurgency allowance which was being paid to the deceased. Thus after deducting the amount of 178 + 30 = Rs.208/- from the gross salary of the deceased the net amount comes to Rs.6,314.00. Thus the annual income of the deceased comes to Rs. 6314 x 12 = Rs.75768/- After deducting 1/3 i.e. Rs. 25,256/- for his own expenses of the deceased, if he would have been alive the net amount of dependency of the claimants on the income of the deceased comes to 75768- 25256 = Rs.50,512.00. According to the claimants the age of the deceased at the time of accident was 22 years, however no documents has been filed by the claimants in support of their assertion. P.W. 1 Smt. Dhan Kumari has stated her age as 22 years and the age of her elder son as 6 years. Her statement was recorded after about 14 months of the accident. Thus considering the age of the wife and children of the deceased he was at least 28 years of age at the time of accident and as such a multiplier of 15 shall be just and proper. Thus by

multiplying the annual dependency of Rs.50512/- by 15 the amount of compensation comes to Rs. 7,57,680.00.

17. The claimants are also entitled to get a consolidated amount of Rs.10,000/- towards loss of consortium and funeral expenses. Thus the claimants are entitled to get Rs.7,67,680/- as compensation.

18. The interest awarded by the Tribunal at the rate of 9% is modified to 6% per annum.

19. For the foregoing reasons, the appeal filed by the appellants against the Award dated 6.4.2004 is allowed. The compensation of Rs.4,34,000.00 awarded by the Tribunal is enhanced to Rs.7,67,680.00 along with pendente lite and future interest @ 6% per annum. The amount of compensation shall be distributed amongst the claimants at the same ratio as fixed by the Tribunal.

20. No order as to costs.

(Rajesh Tandon, J.) **(Rajeev Gupta, C.J.)**

Dated: September 8, 2006

*Dhyani